



Commonwealth of Kentucky
Finance and Administration Cabinet
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Steven L. Beshear
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June 8, 2010

No. 10-05

Wendy J. Goodenough
In-House Counsel
ENA/Necco
P.O. Box 568
South Point, OH 45680

RE: Determination of Protest: RFP 736 1000000010 (Intensive In-Home Grant/Two Rivers & Lakes Region).

Dear Ms. Goodenough:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of ENA/Necco ("Necco") relating to RFP 736 1000000010 for Intensive In-Home Grant/ Two Rivers & Lakes Region (the "RFP"). For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

The Cabinet for Health and Family Services ("CHFS") issued the RFP on September 10, 2009. According to the RFP:

It is the intent of the Cabinet for Health and Family Services, Department for Community Based Services (DCBS) to issue an RFP for the provision of intensive and comprehensive home-based services that will be utilized to either divert youth (age 5 and enrolled in school up to age 17) from an out-of-home care (OOHC) placement or reunify youth currently in out-of-home care with their family. The youth to be served have either been committed to DCBS and placed in OOHC or are at risk of commitment and placement outside the home. Through these in-home services, children will safely remain in or safely return to their homes, without additional abuse or neglect. Services are to be provided in the following

five (5) Service Regions: Eastern Mountain, Northeastern, Cumberland, Two Rivers and the Lakes.

Intensive In-Home Program services are to maintain children safely in their home, to prevent unnecessary placement and to facilitate the safe and timely return home for a child in placement. The services may be provided directly by the successful vendor and/or through appropriate community resources. The expected outcome for this project is that a minimum of 75% of youth served will remain safely at home with their family one year post-termination of intensive in-home services.

RFP, Section 1.00. The resulting contract “scope of work” was generally described as follows:

The Cabinet for Health and Family Services, Department for Community Based Services has over seven thousand (7,000) children in Out-of-Home Care throughout Kentucky. The removal of children from their home due to family or caregiver abuse or neglect is disruptive and traumatic. DCBS recognizes the need for valuable assessment tools, intervention strategies, services and supports to assist families and children to meet the goal of remaining in the home. DCBS expects the successful respondent to work with local DCBS staff to assess the referred families and to design flexible family-focused service plans specifically to address keeping the child in their home, or to return the child to their home with those services and supports designed to provide a safe and stable environment.

RFP, Section 2.00.

The RFP was to be scored based on: (1) a technical evaluation and (2) a cost proposal. RFP Section 5 (Technical Proposal) and Section 6 (Cost Proposal).

The RFP closed on September 16, 2009. Necco submitted a proposal. Bellewood Presbyterian Home For Children, Inc. (“Bellewood”) was awarded two contracts on January 8, 2010: one contract for the Two Rivers Region and a second contract for the Lakes Region.

Necco filed a written protest to the awards with the Secretary of the Finance Cabinet (“Secretary”) on January 22, 2010. Necco objected to the awards because Bellewood provided a “likely erroneous response” and had “staffing issues.” On February 2, 2010, Bellewood provided a written response. On March 19, 2010, Necco filed a second letter which provided supplemental information to support its protest. On March 30, 2010, Bellewood provided a written response to the supplement.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest, the responses thereto, and other relevant information, the Secretary finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of the Finance Cabinet. KRS 45A.285. Necco submitted a proposal in response to the RFP. Therefore, Necco has standing to protest the award of the RFP.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person knows or should have known of the facts giving rise thereto. KRS 45A.285(2). Here, the award was made on January 8, 2010. Necco filed its written protest on January 22, 2010. The protest was filed within two calendar weeks and is, accordingly, timely.

Necco filed a supplement to its protest on March 19, 2010. A supplement may be timely if it is filed within fourteen (14) calendar days after the protestor "knew or should have known" of the additional facts. KRS 45A.285(2). The inquiry about when the protestor "knew or should have known" the factual basis giving rise to the protest is guided by the (1) availability of the relevant facts and (2) the protestor's diligence to uncover those facts. *Matter of: Air Masters Corporation*, 92-2 CPD 299 (Comp.Gen. 1992) (protestor must diligently pursue information that forms the basis of protest); *Warren Elec. Constr. Corp.*, 90-2 CPD ¶34. (Comp.Gen. 1990) (protestor has an affirmative obligation to seek the information that forms its basis of protest). New factual allegations made in submissions after the initial protest, without a new and separate showing of timeliness, will be disregarded as untimely. KRS 45A.285.

In this case, the initial letter of protest states that Necco is seeking further information pursuant to an Open Records request. The supplement, however, does not state when the records were received or what other efforts were made to discover the new facts. Necco does not provide any explanation why the information contained in its supplement was not presented earlier. Accordingly, the information received in the supplement is untimely.

This RFP was for a "Personal Service Contract." KRS 45A.695. A Personal Service Contract ("PSC") is a contract by which an individual or entity "is to perform certain services requiring professional skill or professional judgment for a specified period of time at a price agreed upon." KRS 45A.690 (1)(f). An award of a PSC is to be made to the "best qualified of all offerors based on the evaluation factors set forth in the request for proposals and the negotiation of fair and reasonable compensation." KRS 45A.695(5). The PSC RFP evaluation and award process involves agency *discretion*. As a result, a protest to an agency award of a PSC RFP will be reviewed by the arbitrary, capricious, or contrary to law standard. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Thus, the protestor has the burden to show that the agency's actions were either without a reasonable basis or in violation of applicable procurement law. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997). The protestor must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protestor's mere disagreement with the agency's judgment. *Systems & Processes*

Engineering Corp., 88-2 CPD ¶478 (Comp.Gen 1988). The Secretary will not “substitute [his] judgment ... for that of the agency, but [will] intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable.” *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). If the agency shows that there was a reasoned basis for its decision, the award must be upheld. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998).

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) (“[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it.”). To show prejudice, the protester must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Applying these general rules to the specific grounds of protest, the Secretary finds as follows:

Necco objects to the contract awards because Bellewood provided a “likely erroneous response” and had “staffing issues.”

The first basis of protest is based on information concerning Bellewood facility deficiencies which Necco heard at “advocacy meetings.” Thus, the initial protest letter's allegations are based upon hearsay and speculation. In its untimely supplement, Necco did provide additional documentation to support its first basis of protest. Necco provided certain documents which it apparently obtained by its Open Records request. In the year 2009, CHFS found a number of deficiencies at facilities managed by Bellewood. A review of these materials indicates (1) that CHFS closely monitors Bellewood's facilities and (2) that Bellewood has taken corrective actions in response.

Necco apparently contends that *all* deficiencies needed to be disclosed in the solicitation response. In contrast, Bellewood states that it understood that it was required to disclose “significant” deficiencies. CHFS appears to agree with Bellewood. Since CHFS closely monitors the Bellewood facilities and determined to award contracts to Bellewood, it appears that CHFS either did not believe the deficiencies to be relevant or to be significant. *Laboratory Corp. of America Holdings v. Rudolph*, 184 S.W.3d 68 (Ky.App. 2005) (an alternative interpretation of proposal terms does not establish that an agency acted in arbitrary and capricious manner).

The ground for the second basis of protest is a belief that it is not “logistically possible” for one specific individual to act as a Treatment Director at three separate facilities. This allegation is speculation.

CHFS determined that Bellewood's proposal was the “best qualified of all offerors based on the evaluation factors set forth in the request for proposals . . .” KRS 45A.695(5). A determination by an agency is entitled to a presumption of correctness. KRS 45A.280. A protester must clearly establish that a solicitation evaluation was irrational or contrary to law. This is not accomplished by the protester's mere disagreement with the agency's award. *Systems & Processes Engineering Corp.*, 88-2

CPD ¶478 (Comp.Gen 1988). Necco's initial protest is based upon speculation. It has provided no evidence or proof that the awards to Bellewood were arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). Accordingly, this protest is without merit.

In addition, Necco has not demonstrated prejudice. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) ("[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it."). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999). Necco has made no such showing.

Accordingly, upon review of the record, the protest of Necco lacks merit. Necco also has not established prejudice. Further, the presumption of correctness in KRS 45A.280 applies and Necco has failed to provide sufficient evidence to overcome this presumption. Since there is no basis to overturn this procurement, the protest must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by the Secretary shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation



Robin Kinney
Executive Director
Office of Administrative Services

cc: Joan Graham, CHFS
Jerry Cantrell, Bellewood